chase price out of his own substance. He was also a trustee of a fund for a third party, and, in breach of trust, used a part of the fund to pay for the land, and received title. *Held*, that, as between the corporation and the third party, the former is entitled to the land to the exclusion of the latter. *Seacoast R. R. Co.* v. *Wood*, 56 Atl. Rep. 337 (N. J. Ch.). See NOTES, p. 352.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

RESCISSION FOR BREACH OF WARRANTY. — An article by Professor Williston in 16 HARV. L. REV. 465, on this subject, has called forth a reply from the author of a well-known treatise on Sales, Professor Francis M. Burdick, of Columbia Law School. *Rescission for Breach of Warranty*, 4 Columbia L. Rev. 1 (Jan. 1904). Professor Burdick, though evidently not in sympathy with the so-called "Massachusetts rule" which Professor Williston supports, devotes his attention mainly to the effort to show that of the twelve states which were cited as having adopted this view, only six are committed to it, and three of these by *dicta* only. Most of the cases cited by Professor Williston would, he declares, have been similarly decided in England.

It is apparent that so complete a disagreement as to the classification of cases, between such learned and careful investigators, must be based on different views as to the location of the boundary line on one side or the other of which a case is to be ranged. Professor Williston finds the real distinction taken by the English law to be that between executed and executory contracts, no rescission being allowed in any case of an executed sale. Professor Burdick, on the other hand, finds the English distinction to lie between conditions and collateral warranties, the purchaser being allowed to rescind even after acceptance of title for the breach of a condition.

Among "conditions" the Sale of Goods Act includes the implied engagement that the vendor has title, that goods ordered by description shall correspond with the description and be merchantable, etc., §§ 12, 13, 14. In nearly all of the cases in dispute the engagement fell within one of these classes, and, after acceptance of the title, rescission was allowed upon discovery of the defect. *Polhemus* v. *Heiman*, 45 Cal. 573. *Gale, etc., Manufacturing Co.* v. *Stark*, 45 Kan. 606. *Branson* v. *Turner*, 77 Mo. 489. When Professor Burdick says that these cases would be similarly decided in England, he must, it would seem, overlook or misinterpret § 11, (1), c, of the Sale of Goods Act, which provides that "where . . . the buyer has accepted the goods . . ., or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect." Exactly what would amount to an "implied term" in the contract, allowing rescission, it may be hard to say: but clearly such a term is not to be implied merely because there is a condition, for this would render the section absolutely meaningless. It is of course true that even in England the buyer has a reasonable time to examine the goods before accepting title. *Okell* v. *Smith*, 1 Stark. N. P. 107. See *Street* v. *Blay*, 2 B. & Ad. 456, 463. But surely there can be no ground for contention that the property had not passed in a case where the guano purchased had been put into the soil by the buyer, as in *Pacific, etc., Co.* v. *Mullen*, 66 Ala. 582. The other cases are only less clear. In practically all of the cases in question the language of the courts goes the full length, nor is a possible distinction between conditions and warranties anywhere adverted to.

Professor Burdick appears to find the basis of his view that the acceptance of title does not bar the right of rescission for breach of a condition in the leading case of *Street* v. *Blay*, *supra*. But certainly the decision in that case does not warrant it, for rescission was refused; nor is there anything in the opinion to indicate it. Lord Tenterden says the vendee "has no right . . . to return . . . unless there has been a condition in the contract authorizing the return, or the vendor has received back the chattel." It is very clear that this was intended to mean nothing more than "a term in the contract authorizing the return." And the cases cited by Lord Tenterden do not suggest the distinction. Professor Burdick's view has the support of Mr. Benjamin. BENJAMIN, SALES, 7th ed., § 887. But no decisions are cited in support of the author's statement. Whatever the English law has been in the past, it appears to be settled now by the Sale of Goods Act. But this only purported to codify the existing law. See also *Behn* v. *Burness*, 3 B. & S. 751, 755.

THE STOCKHOLDER'S RIGHT TO VOTE. — Since stability and permanence became recognized as essential to the management of large corporate enterprises, the commercial desire to attain these essentials has induced the making of voting trusts and stockholders' voting agreements. From the legal standpoint, these devices for control raise the most important questions concerning the nature of the stockholder's voting power and the stockholder's duty as regards voting. Upon the answer to these questions depend the vast financial arrangements attending the railroad reorganizations of recent years. The reluctance of the courts to adopt the commercial view and the uncertainty in which the decisions have left the question are set forth by Mr. Edward A. Harriman in an article on *Voting Trusts and Holding Companies*, 13 Yale L. J. 109 (Jan. 1904). Mr. Harriman urges that the stockholder's voting power is a property right which may be separated irrevocably from his legal as well as from his beneficial ownership; and that the stockholder may make any arrangement he wishes for the exercise of this property right, so long as he observes his duty not to deprive other stockholders of their substantial rights in the corporation.

So long as the stockholder votes in person, no "motives or promptings of what he considers his individual interest" can restrict his voting power. *Pender* v. *Lushington*, L. R. 6 Ch. D. 70, 90. But he owes the duty to the other stockholders, it is sometimes said, to express and exercise his judgment in respect to the affairs of the corporation. *Harvey* v. *Linville Improvement Co.*, 118 N. C. 693. This alleged duty, it seems, is the basis of the oft-repeated maxim that "an untrammelled right to vote shall be incident to the ownership of the stock." *Shepang Voting Trust Cases*, 60 Conn. 553, 576. How far these statements of the duty of the stockholder and the nature of his voting power are borne out by the cases may best be seen in the decisions upon three classes of voting arrangements: first, contracts between stockholders to vote their stock as a unit for the policy directed by a majority of their number; second, contracts between stockholders by which proxies, not accompanied by the transfer of stock on the books of the corporation, are given to trustees who may vote as they determine; third, contracts between stockholders by which their stock is transferred on the books of the corporation to trustees, who pay over the dividends to the transferring stockholders but vote the stock as they themselves determine. The first sort of arrangement is generally held legal, but the opinion is freely expressed that it is revocable. *Fauld* v. *Yates*, 57 Ill. 416. In one jurisdiction such an agreement has been held irrevocable. *Smith* v. *San Francisco, etc., Ry. Co.*, 115 Cal. 584. On the other hand, in reviewing an arrangement of this sort the purpose of which was fraudulent, one trial court has declared all such agreements illegal. *Cone* v. *Russell*, 48 N. J. Eq. 208. But see *Chapman* v. *Bates*, 61 N. J. Eq. 658. The second sort of arrangement has been generally held legal, but the implication is strong that it is always revocable. *Brown* v. *Pacific Mail, etc., Co.*, 5 Blatchf. (U. S. C. C.) 525. One jurisdiction, indeed, has held such an agreement irrevocable. *Mobile, etc., R. R. Co.* v. *Nicholas*, 98 Ala. 92. Another, in the